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FEDERAL DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 TERRY McKINLEY,  
12 CDCR #C-94117,

Plaintiff,

13  
14 vs.  
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16  
17 AMY MILLER; J.G. JANDA;  
18 R. PREMDAS; B. HUGIE,

19 Defendants.  
20  
21

Civil No. 15cv0228 WQH (RBB)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
[ECF Doc. No. 2]**

**AND**

**(2) SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM PURSUANT  
TO 28 U.S.C. § 1915(e)(2)(B)(ii)  
AND 28 U.S.C. § 1915A(b)(1)**

22  
23 Terry McKinley (“Plaintiff”), a state prisoner currently incarcerated at California  
24 Men’s Colony West located in San Luis Obispo, California, and proceeding pro se, has  
25 filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983.

26 Plaintiff claims Defendants violated his constitutional rights when he was housed  
27 at Centinela State Prison (“CEN”) in 2014. Plaintiff has not prepaid the \$400 filing fee  
28 mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma*

1 *Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2).

2 **I. MOTION TO PROCEED IFP**

3 All parties instituting any civil action, suit or proceeding in a district court of the  
4 United States, except an application for writ of habeas corpus, must pay a filing fee of  
5 \$400. *See* 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite a plaintiff’s failure to  
6 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
7 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a  
8 prisoner granted leave to proceed IFP remains obligated to pay the entire fee in  
9 installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C.  
10 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

11 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act  
12 (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the  
13 trust fund account statement (or institutional equivalent) for the prisoner for the six-  
14 month period immediately preceding the filing of the complaint.” 28 U.S.C.  
15 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
16 trust account statement, the Court must assess an initial payment of 20% of (a) the  
17 average monthly deposits in the account for the past six months, or (b) the average  
18 monthly balance in the account for the past six months, whichever is greater, unless the  
19 prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1), (b)(4). The institution having  
20 custody of the prisoner must collect subsequent payments, assessed at 20% of the  
21 preceding month’s income, in any month in which his account exceeds \$10, and forward  
22 those payments to the Court until the entire filing fee is paid. 28 U.S.C. § 1915(b)(2).

23 Plaintiff has submitted a certified copy of his trust account statement pursuant to  
24 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. The  
25 Court has reviewed Plaintiff’s trust account statement, as well as the attached prison

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26  
27 <sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1,  
28 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial  
Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May 1, 2013). However,  
*Id.* the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP.

1 certificate verifying his available balances, and has determined that Plaintiff has no  
2 available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4)  
3 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action  
4 or appealing a civil action or criminal judgment for the reason that the prisoner has no  
5 assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at  
6 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal  
7 of a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds  
8 available to him when payment is ordered.”).

9 Therefore, the Court **GRANTS** Plaintiff leave to proceed IFP (ECF Doc. No. 2)  
10 and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire  
11 \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk  
12 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
13 § 1915(b)(1).

## 14 **II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2)(B) AND § 1915A(b)**

### 15 **A. Standard of Review**

16 Notwithstanding IFP status or the payment of any partial filing fees, the PLRA  
17 also obligates the Court to review complaints filed by all persons proceeding IFP, and  
18 by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
19 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms  
20 or conditions of parole, probation, pretrial release, or diversionary program,” “as soon  
21 as practicable after docketing.” *See* 28 U.S.C. § 1915(e)(2)(B), § 1915A(a), (b). Under  
22 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,  
23 which are frivolous, malicious, fail to state a claim, or which seek damages from  
24 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*  
25 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*  
26 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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1 All complaints must contain “a short and plain statement of the claim showing that  
2 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are  
3 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by  
4 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
5 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining  
6 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that  
7 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*  
8 The “mere possibility of misconduct” falls short of meeting this plausibility standard.  
9 *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

10 “When there are well-pleaded factual allegations, a court should assume their  
11 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
12 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
13 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
14 allegations of material fact and must construe those facts in the light most favorable to  
15 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
16 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

17 However, while the court “ha[s] an obligation where the petitioner is pro se,  
18 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
19 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
20 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not  
21 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*  
22 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and  
23 conclusory allegations of official participation in civil rights violations are not sufficient  
24 to withstand a motion to dismiss.” *Id.*

### 25 B. 42 U.S.C. § 1983

26 “Section 1983 creates a private right of action against individuals who, acting  
27 under color of state law, violate federal constitutional or statutory rights.” *Devereaux*  
28 *v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of

1 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
2 conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks  
3 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)  
4 deprivation of a right secured by the Constitution and laws of the United States, and (2)  
5 that the deprivation was committed by a person acting under color of state law.” *Tsao*  
6 *v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

### 7 **C. Eighth Amendment Failure to Protect Claims**

8 The Eighth Amendment requires that prison officials take reasonable measures to  
9 guarantee the safety of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). In  
10 particular, prison officials have a duty to protect prisoners from violence at the hands of  
11 other prisoners. *See id.* at 833; *Hoptowit v. Ray* 682 F.2d 1237, 1250-51 (9th Cir. 1982)  
12 (“Prison officials have a duty to take reasonable steps to protect inmates from physical  
13 abuse.”). However, a prison official violates the Eighth Amendment only when two  
14 requirements are met: (1) the deprivation alleged is, objectively, sufficiently serious; and  
15 (2) the prison official is, subjectively, deliberately indifferent to inmate safety. *Farmer*,  
16 511 U.S. at 834; *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). “Deliberate  
17 indifference” requires that the official knows of and disregards an excessive risk to  
18 inmate health or safety. *Farmer*, 511 U.S. at 837. The official must both be aware of  
19 facts from which the inference could be drawn that a substantial risk of serious harm  
20 exists, and he must also draw the inference. *Id.*

21 As currently pleaded, the Court finds Plaintiff has failed to allege facts sufficient  
22 to support a plausible claim for relief under the Eighth Amendment against Defendants  
23 because he has failed to include “further factual enhancement” from which the Court  
24 may reasonably infer that any of the named Defendants acted, or failed to reasonably act,  
25 under circumstances which presented a “substantial” or obvious risk” of “imminent”  
26 harm to Plaintiff. *See Iqbal*, 556 U.S. at 678; *Baze v. Rees*, 553 U.S. 35, 50 (2008) (to  
27 be deliberately indifferent, a prison official must fail to reasonably act under  
28 circumstances which are “sure or very likely to cause serious . . . and needless

1 suffering” and which “give rise to ‘sufficiently imminent dangers.’” (quoting *Helling*  
2 *v. McKinney*, 509 U.S. 25, 33-35 (1993)).

3 In Plaintiff’s Complaint he generally refers to “prison officials” “intentionally  
4 creating and spreading false rumors” in which Plaintiff was allegedly labeled an  
5 informant. (Compl. at 14.) Plaintiff does allege that he was injured by other inmates but  
6 he fails to identify with any specificity how the named Defendants were personally  
7 involved in the allegation that he was labeled an informant.

8 Thus, as currently pleaded, the Court finds Plaintiff’s Eighth Amendment failure  
9 to protect claims against Defendants are merely “consistent with” their possible liability,  
10 but, without more are insufficient to “nudge [Plaintiff’s] his claim” of cruel and unusual  
11 punishment “across the line from conceivable to plausible.” *Iqbal*, 556 U.S. at 678, 680  
12 (citing *Twombly*, 550 U.S. at 557, 570).

13 Accordingly, Plaintiff’s Eighth Amendment failure to protect claims must be  
14 dismissed sua sponte for failing to state a claim upon which relief can be granted  
15 pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii) and § 1915A(b)(1), but without prejudice so  
16 that Plaintiff may attempt to properly amend them in light of the standard of pleading  
17 outlined above. *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446; *Lucas v.*  
18 *Dept. of Corr.*, 66 F.3d 145, 248 (9th Cir. 1995) (per curiam) (“Unless it is absolutely  
19 clear that no amendment can cure [a pleading] defect . . ., a pro se litigant is entitled to  
20 notice of the complaint’s deficiencies and an opportunity to amend prior to dismissal of  
21 the action.”).

#### 22 **D. Due Process Claims**

23 Plaintiff further alleges to have been deprived of thirty (30) days of behavior credit  
24 as a result of his disciplinary conviction for possessing a controlled substance. (*See*  
25 *Compl.* at 8.) The Court finds this claim must also be dismissed for failing to state a  
26 claim upon which section 1983 can be granted because a finding in Plaintiff’s favor  
27 would “necessarily imply the invalidity” of his disciplinary conviction. *See Heck v.*  
28 *Humphrey*, 512 U.S. 477, 486-87 (1994); *Edwards v. Balisok*, 520 U.S. 641, 643-44

1 (1997).

2 *Heck* and *Balisok* make clear that constitutional claims involving a prison's  
3 disciplinary decision to revoke behavioral credits fail to state a claim under section 1983  
4 since habeas corpus is the exclusive federal remedy whenever a claim for damages  
5 depends on a determination that a disciplinary judgment is invalid or the sentence  
6 currently being served is unconstitutionally long. *Balisok*, 520 U.S. at 643-44; *Heck*, 512  
7 U.S. at 486-87; *see also Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973) (holding that  
8 a person in state custody may not use § 1983 to challenge “the very fact or duration of  
9 . . . confinement” by seeking “a determination that he is entitled to immediate release or  
10 a speedier release from that imprisonment.”); *Nonnette v. Small*, 316 F.3d 872, 875 (9th  
11 Cir. 2002) (“It has been clear for over thirty years that a state prisoner seeking injunctive  
12 relief against the denial or revocation of good-time credits must proceed in habeas  
13 corpus, and not under § 1983.”).

14 Here, Plaintiff's § 1983 claim for money damages necessarily implies the  
15 invalidity of his disciplinary conviction and renders his claim incognizable under *Heck*.  
16 *Balisok*, 520 U.S. at 648; *see also Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005)  
17 (noting that “a state prisoner's § 1983 action is barred (absent prior invalidation)—no  
18 matter the relief sought (damages or equitable relief), no matter the target of the  
19 prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if*  
20 success in that action would necessarily demonstrate the invalidity of confinement or its  
21 duration.”) (emphasis in original).

22 Thus, in addition to amending his pleading to state an Eighth Amendment claim,  
23 Plaintiff must also amend to allege facts sufficient to show that Defendants' decision to  
24 revoke thirty days of his behavioral credit has already been “reversed on direct appeal,  
25 expunged by executive order, declared invalid by a state tribunal authorized to make  
26 such a determination, or called into question by a writ of habeas corpus.” *Heck*, 512 U.S.  
27 at 486-87. Until and unless he can do so, no cause of action will accrue under § 1983.

28 *Id.*

1 **IV. CONCLUSION AND ORDER**

2 Good cause appearing, **IT IS HEREBY ORDERED** that:

3 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (Doc. No.  
4 2) is **GRANTED**.

5 2. The Secretary of the California Department of Corrections and  
6 Rehabilitation, or his designee, shall collect from Plaintiff's prison trust account the  
7 \$350 filing fee owed in this case by collecting monthly payments from the account in an  
8 amount equal to twenty percent (20%) of the preceding month's income and forward  
9 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in  
10 accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY**  
11 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

12 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey  
13 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O. Box  
14 942883, Sacramento, California, 94283-0001.

15 **IT IS FURTHER ORDERED** that:

16 4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which  
17 relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

18 5. Plaintiff is **GRANTED** forty-five (45) days leave from the date of this  
19 Order in which to file a First Amended Complaint which cures the deficiencies of  
20 pleading noted above. Plaintiff's Amended Complaint must be complete in itself without  
21 reference to his original pleading. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*  
22 *v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended  
23 pleading supersedes the original.”); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)  
24 (citation omitted) (“All causes of action alleged in an original complaint which are not  
25 alleged in an amended complaint are waived.”).

26 If Plaintiff fails to file an Amended Complaint within the time provided, this civil  
27 action shall remain dismissed without prejudice based on Plaintiff's failure to state a  
28 claim upon which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and



1 § 1915A(b)(1).

2 6. The Clerk of Court shall mail Plaintiff a court approved civil rights  
3 complaint form.

4 DATED: 3/5/15



5  
6 HON. WILLIAM O. HAYES  
United States District Judge

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